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**VACCINATION AGAINST SMALLPOX.**

**NORTH DAKOTA SUPREME COURT DECIDES THAT UNVACCINATED CHILDREN CAN NOT BE EXCLUDED FROM SCHOOL WHEN SMALLPOX IS NOT PRESENT.**

The right to exclude children from school on the ground of non-vaccination, when smallpox is not present or "reasonably to be apprehended" in a community, is denied by the Supreme Court of North Dakota.<sup>1</sup>

The State board of health ordered that all children should be vaccinated before being allowed to attend school. Acting under this order, the board of education of Devils Lake Special School District made a similar order refusing admission to unvaccinated children. Smallpox was not present and the court assumed that it was not "reasonably to be apprehended" when the order was made. Under the law the State board of health had power to make and enforce regulations for the prevention of communicable diseases. It was also made the duty of parents or guardians to have minors vaccinated. Another provision of the statutes enumerated the causes for exclusion from school, but nonvaccination was not one of the causes.

Construing these various provisions, the court held, in a proceeding against the board of education, that the State board of health was not authorized to make such an order and that the board of education could not exclude children solely on the ground of non-vaccination. In the opinion it was said:

\* \* \* Bearing in mind the rule that statutory boards possess only the authority vested in them, the maxim "*Expressio unius est exclusio alterius*," applies with peculiar force where a statute, while clearly defining a duty to exclude pupils from schools on the ground of the danger of spreading contagious and infectious diseases, does not include nonvaccination as a ground for exclusion. This statute (sec. 426, C. L. 1913) predicates the exclusion either upon the ground that the pupil is infected, or that he comes from an infected habitation. It would seem, if it were intended that nonvaccination should be considered a reason for withholding permission to attend schools, that it would be included in any enumeration of the grounds for exclusion in a statute such as section 426, *supra*. This applies with peculiar force here as the compulsory vaccination statute is the immediately preceding section of the same chapter, both being adopted at the same time. (See Session Laws of 1893, c. 90, secs. 13, 14.) We are of the opinion that the failure to include nonvaccination as a ground for excluding a pupil from attendance at school, in section 426, Compiled Laws of 1913, is a strong indication that such a power was not intended to be given, either to the board of health or a board of education.

But it is contended that, since section 425 of the Compiled Laws of 1913 requires the vaccination of minors generally, it was proper for the State board of health to promulgate an order which would not affect adversely anyone who had complied with the statute. The failure to comply with the compulsory vaccination statute results in making the one who thus fails guilty of a misdemeanor, and subjects him to the prescribed punishment. It is not particularly the function of the board of health to compel

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<sup>1</sup> *Rhea v. Board of Education of Devils Lake Special School Dist.*, 171 N. W., 103.

compliance with this statute. The board is not the public prosecutor. Even the public prosecutor could not compel vaccination. He can only punish for violations of the statutes, and to exclude one from school on the same ground would be to add a penalty not included in the statute. The powers of the board of health are limited to such needful rules and regulations as may be required for the prevention [of the] spread of contagious and infectious diseases, and the fact that the legislature has purported to make vaccination compulsory does not add to or subtract from the scientific data upon which the board of health may determine whether or not a proposed rule or regulation is "needful." The authorities uniformly hold that a board of health, constituted as our board of health is, possessing requisite general powers for the prevention [of the] spread of contagious diseases, can not promulgate and enforce rules which merely have a tendency in that direction, but which are not founded upon any existing condition or upon a danger not reasonably to be apprehended. \* \* \*

The authorities principally relied upon by counsel for the respondent will be found to sustain one of two general propositions with which we are not concerned in the instant case. They either support the right of a board of education or a board of health to make vaccination a condition of attendance at school where there is an express statute or ordinance to that effect, \* \* \* or they support the right of such boards to exercise the power to compel vaccination or exclusion as a means of controlling and preventing the spread of the disease during an actual or reasonably imminent epidemic. \* \* \*

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